Supreme Court, U. S.
FILED
MAY 7 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1684

THOMAS M. FAHEY, *Appellant,*

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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May 7, 1979

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In The

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OCTOBER TERM, 1978

No.

THOMAS M. FAHEY, *Appellant*,

v.

CHARLES J. HYNES (Special Prosecutor), *Appellee*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Thomas M. Fahey, the appellant, appeals from the final judgment of the New York State Court of Appeals, dated February 6, 1979, upholding the constitutionality of a New York State statute, which statute authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any agency of the State having the power to issue subpoenas, and which statute was challenged by the appellant as being violative of the Fourth Amendment (search and seizure protections), the Fifth Amendment (self-incrimination and due process), and the Fourteenth Amendment (taking of property without due process), both on its face and as applied to appellant.

OPINIONS BELOW

The opinions of three New York State Courts, namely, the Court of Appeals, the Appellate Division (Fourth Department) of the Supreme Court, and the Supreme Court Special Term (Onondaga County) appear in the Appendix hereto.

The opinion of the Court of Appeals is unreported, and is included herein at page A-1 of the Appendix.

The opinion of the Appellate Division (Fourth Department) of the Supreme Court is reported at 63 AD2d 1119 (1978), and is included herein at page A-2 of the Appendix.

The opinion of the Supreme Court Special Term (Onondaga County) is unreported, and is included herein at pages A-2 and A-3 of the Appendix.

JURISDICTION

The judgment of the New York State Court of Appeals upholding the constitutionality of the challenged state statute was entered on February 6, 1979.

A notice of appeal to this Court was duly filed in the New York State Court of Appeals on April 25, 1979.

An application for extension of time to docket the appeal was filed with this Court (Associate Justice Marshall) on April 27, 1979, more than 10 days before the due date for the docketing, and was denied on April 30, 1979.

This appeal is being docketed in this Court within 90 days from the entry of the judgement in the New York State Court of Appeals. The jurisdiction of this Court is involved under 28 U.S.C. § 1257 (2).

QUESTIONS PRESENTED

Fourth Amendment question:

Does a State statute that authorizes warrantless seizures by the mere issuance of a non-judicial subpoena by any State agency authorized to issue subpoenas violate, on its face, the Fourth Amendment prohibitions against warrantless searches and seizures on the grounds that:

(1) the statute does not require the State agency to obtain either a "search" warrant (for a criminal purpose) or an "inspection" warrant (for a civil purpose) upon the refusal of a subpoenaed party to permit a warrantless seizure of his property (including his books and papers), and,

(2) the statute does not in any respect qualify as one of the "exceptions" to the prohibition against warrantless seizures.

Fifth Amendment question:

The Fourth Amendment question aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the self-incrimination and due process protections of the Fifth Amendment on the grounds that the statute requires compulsive authentication and surrender of all subpoenaed documents and fails to provide a subpoenaed party who is an individual or a sole proprietor the opportunity to assert, if he wishes, under due process testimonial conditions, his Fifth Amendment privilege (regarding testimony, property, or books and records), and which compulsion is compounded by a companion statute that makes it a crime (misdemeanor) for a subpoenaed party to refuse to testify or to surrender possession of subpoenaed books and records.

Fourteenth Amendment question:

The Fourth and Fifth Amendment questions aside, does a State statute that authorizes warrantless seizures by any State agency authorized to issue subpoenas violate, on its face, the Fourteenth Amendment protection against the taking of property without due process, on the ground that the statute does not require the State, prior to the taking of property, to satisfy all the fundamentals of due process (notice, evidentiary hearing, and judicial sanction).

STATUTE CHALLENGED AS UNCONSTITUTIONAL

New York State Civil Practice Law and Rules (CPCR), Section 2305 (c), as amended, effective July 19, 1977

§ 2305. Attendance required pursuant to subpoena; possession of books, records, documents or papers...

(c) Inspection, examination and audit of records. Whenever by statute any department or agency of government, or officer thereof, is authorized to issue a subpoena requiring the production of books, records, documents or papers, the issuing party shall have the right to the possession of such material for a period of time, and on terms and conditions, as may reasonably be required for the inspection, examination or audit of the material. The reasonableness of such possession, time, terms, and conditions shall be determined with consideration for, among other things, (i) the good cause shown by the issuing party, (ii) the rights and needs of the person subpoenaed, and (iii) the feasibility and appropriateness of making copies of the material. The cost of reproduction and transportation incident thereto shall be borne by the person or party issuing the subpoena unless the court determines otherwise in the interest of justice.

RELEVANT COMPANION STATUTE

New York State Executive Law, § 63 (8), as amended, effective July 19, 1977:

8. ... The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require that any books, records, documents or papers relevant or material to the inquiry be turned over to him for inspection, examination or audit, pursuant to the civil practice law and rules. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered to do so by the officer conducting such inquiry, he shall be guilty of a misdemeanor...

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, United States Consitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;...

Fourteenth Amendment, United States Constitution:

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Proceedings in the lower courts and how the Federal questions were raised

The appellant Thomas M. Fahey is a sole proprietor who owns a private (proprietary) nursing home licensed under the laws of the State of New York (the Castle Rest Nursing Home). The appellant has been the sole owner of the nursing home since October 19, 1972, and also serves as the administrator of the nursing home.

The appellee Charles J. Hynes is a Special Prosecutor appointed by the Governor of the State of New York on January 10, 1975 to conduct criminal investigations in the nursing home industry, for which purpose regional offices were set up by the appellee throughout the State of New York, including one in Syracuse, New York, where appellant's nursing home is located.

On January 23, 1978 the appellant was served with a non-judicial subpoena dated January 23, 1978 from the Syracuse office of the appellee. The subpoena commanded the appellant to appear at the Syracuse office of the appellee on January 30, 1978 and also commanded him to bring with him ... "the books and records of Castle Rest Nursing Home enumerated on the attached rider, pertaining to the years 1971 through 1975 inclusive."

The attached rider listed the following schedule of documents pertaining to the years 1971 through 1975 inclusive:

"Schedule of Subpoenaed Documents

1. General ledger.
2. Cash receipts journal, disbursement journal and register.
3. Purchase journal and supporting vouchers.
4. All invoices for goods and services ordered plus receiving reports or similar evidence of actual receipt.
5. Petty cash book, petty cash vouchers and summary.
6. General journal, year end adjusting entries.
7. Subsidiary records for loans payable and receivable and related documents, such as notes, loan agreements and mortgages.
8. Accounts payable subsidiary ledger.
9. Accounts receivable subsidiary ledger.
10. All bank statements, bank reconciliations, cancelled checks, check stubs and voucher copies.
11. All lease and rental agreements.
12. All accounting work papers and schedules.

13. All asset account journals and depreciation schedules.
14. Personnel files for all employees.
15. Patient daily census records.
16. All forms HE-2P submitted to the New York State Health Department."

The following observations regarding the preceeding listing are worthy of note:

(a) The listing literally comprises all of the business records, books, and working papers of the sole proprietorship.

(b) The listing also requires the surrender of both financial and personal information about every employee (Item 10), every patient (Items 2, 9, and 15), every vendor (Items 2, 3, 4, 8, and 11), and all other financial relationships (Items 1, 2, 5, and 7 thru 13).

(c) The only document listed that is "required" by the State is Item 16 (form HE-2P), which is a very detailed statistical and financial report filed annually with the State.

Appellant chose not to appear or to surrender possession of his books and records, and chose instead to move to quash the subpoena at Special Term of the Supreme Court of the State

of New York (Onondaga County).

Proceedings at Special Terms

On January 27, 1978, appellant obtained an Order to Show Cause at a Special Term of the Supreme Court, returnable on January 31, 1978, with a stay in the enforcement of the subpoena pending the return.

On January 31, 1978, appellant was served answering papers by the appellee in which the authority for issuing the subpoena was cited as being "... issued pursuant to Executive Law §63 (8) and CPLR § 2305 as amended by Chapter 451 of 1977 Session Laws."

On the same day, oral argument was had at Special Term, which was transcribed and is part of the record.

As a matter of information, but not directly relevant to the issues presented herein, the appellant did complain to the Court at this hearing that the appellee had already had complete access to the subpoenaed documents during a prior inspection on the premises to which the appellant had consented voluntarily in 1975, which the appellee admitted but justified to the Court on the grounds of now having improved techniques and procedures, which the appellant characterized as harrassment.

The appellant made a request of the Court for the opportunity to either have an evidentiary hearing or in the alternative to be permitted to file reply papers to the answer that had just been received that morning outside the courtroom. The Court denied both requests.

The Court was of the opinion that it did not have the authority to hold up an "administrative" subpoena.

Appellant then raised constitutional issues (relating to the Fourth and Fifth Amendments) and sought to obtain a stay on the enforcement of the subpoena, pending appeal by the appellant directly to the State Court of Appeals on the constitutional grounds above, and requested the opportunity to file a letter-memorandum of law, which the Court granted, provided the memorandum was submitted in a few days.

The appellant complied by submitting a letter-memorandum on February 3, 1978, and the Court, having also received a letter-memorandum from the appellee, issued a letter-opinion on February 14, 1978 in which he ruled against the appellant's constitutional contentions; and also denied the appellant's motion for a stay.

On the same day (February 14, 1978) the Court also issued an order denying appellant's motion to quash the subpoena, and ordering the

appellant to deliver the material listed in the subpoena to the appellee on or before February 23, 1978 (9 days later). This order was not filed and served on the appellant until the Court ordered the appellee to do so three days later on a Friday afternoon (February 17, 1978) so that appellant would not be obstructed in seeking a stay directly from the Court of Appeals.

Proceedings on direct appeal to the Court of Appeals

The next Tuesday (February 21, 1978), after a holiday weekend, appellant's counsel telephoned the Clerk of the Court of Appeals, and was subsequently contacted by Judge Jones of the Court of Appeals, who volunteered to come to Syracuse from Utica, New York the following day to hear full argument on whether to grant a stay on the last day before the documents were required to be delivered.

On Wednesday afternoon (February 22, 1978), Judge Jones heard argument in Syracuse for a full hour during which the appellant vigorously pressed his constitutional arguments.

During the hearing, Judge Jones asked the appellant if he would consent to placing the subpoenaed documents in the custody of the County Court Clerk pending the outcome of the appellant's direct appeal to the Court of Appeals.

Appellant agreed, whereupon Judge Jones signed an Order to Show Cause with a temporary stay, provided the documents were deposited with the Clerk on or before February 28, 1978, which was, in fact done.

On March 23, 1978, after a motion to dismiss the appeal, and after an exchange of affidavits in which the appellant sought to restrict the appeal exclusively to the constitutional issues (and the appellee sought to introduce additional issues), the Court of Appeals transferred the case to the Appellate Division (Fourth Department) to hear any additional issues that might be raised. The application for a stay pending a hearing by the Court of Appeals was dismissed as "academic" since the matter was being transferred to the Appellate Division.

Proceedings at the Appellate Division

Appellant thereupon requested and was granted (on March 31, 1978) a temporary stay with an Order to Show Cause from Associate Justice Hancock of the Appellate Division, pending a determination by the entire Court regarding the granting of a new stay.

The matter of the new stay was fully argued on papers from both parties, and on April 14, 1978 the Appellate Division entered an order granting the appellant a new stay.

In the arguments relating to the granting of the new stay, the appellant voluntarily offered the same consent that had been given to Judge Jones of the Court of Appeals, namely, agreement to allow the subpoenaed documents to remain in the custody of the Onondaga County Court Clerk.

The subpoenaed documents are still in the custody of the Onondaga County Court Clerk since no further stay was necessary, and appellant will of course not remove the documents until the final disposition of the case in this Court.

After the granting of the stay by the Appellate Division, the arguments on the merits were confined exclusively to the consitutional questions raised by the appellant. The constitutional questions that were raised in the Appellate Division are the same questions that are being raised now in this Court, namely, that the challenged statute violates the Fourth Amendment (search and seizure protections), the Fifth Amendment (self-incrimination and due process), and the Fourteenth Amendment (taking of property without satisfying the basic due process requirements (notice, evidentiary hearing, and judicial sanction) prior to the seizure of property.

After oral argument (May 23, 1978) it was learned on the same day from the evening news-

papers that the United States Supreme Court had handed down its decision in the highly significant Fourth Amendment case of Marshall v. Barlow's, Inc., ___ U.S.____, 46 L.W. 4483 (No. 76 - 1143) (decided May 23, 1978).

After receiving the Barlow decision a few days later from Law Week, appellant promptly prepared and submitted to the Appellate Division (on June 1, 1978) a letter-memorandum vigorously putting forth the argument that the Barlow case should be dispositive of the instant case in appellant's favor on Fourth Amendment grounds alone, and that the Barlow case also supported appellant's Fifth Amendment contentions.

Appellant put forth several Barlow case arguments (which are summarized later) but the essence of the appellant's position was that the Barlow decision created an a fortiori situation with respect to the challenged New York statute. Since the New York statute goes much further than the Federal statute that was struck down by the Supreme Court, it follows, a fortiori, that the New York statute must also fall to the same extent that the Federal statute fell.

Appellant also argued, conversely, that if the Congress of the United States ever passed a "seizure" statute as sweeping as the New York "seizure" statute, it would probably be struck

down by a unanimous Supreme Court because even the minority position in the Barlow case, appellate contended, could not support a statute that did not even attempt to qualify as one of the "exceptions" to the Fourth Amendment prohibitions, since the "law" of the Fourth Amendment is promulgated by this Court appears very clearly to be a law of "exceptions".

Appellant also argued, on an even more fundamental basis, that the Barlow case also stood for the proposition that the ultimate decision in any particular question of whether or not to enlarge the "exceptions" to the prohibitions of the Fourth Amendment must be not with the Congress but with the Supreme Court.

(Appellant respectfully submits that if this were not the case, it is easily foreseeable that State Legislatures, and even the Congress itself, could run rampant in days of popular excitement and utterly destroy the entire fabric of Fourth Amendment protections.)

On June 2, 1978, the day after the appellant submitted his special memorandum on the Barlow case, the Appellate Division entered an order adverse to the appellant, affirming the order appealed from without costs. (The appellant has not way of knowing whether the decision of the Appellate Division was made prior to the receipt

of his special memorandum).

Proceedings at the Court of Appeals

The appellant filed a notice of appeal to the New York State Court of Appeals on June 23, 1978. Appellant appealed as of right relying solely on the constitutional questions involving the Fourth, Fifth, and Fourteenth Amendments.

In the subsequent filing of the appellant's jurisdictional statement to the Court of Appeals (on July 3, 1978), appellant included as a part of the jurisdictional statement not only the required lower court orders and opinions, but also the appellant's main brief, reply brief, and special memorandum in the Barlow case that had already been submitted to the Appellate Division.

This was done in order to ensure that the Court of Appeals would have on hand at the outset, as part of the record, all of the appellant's constitutional arguments so there would be no question as to what was being passed on by the Court of Appeals in the event of an adverse decision by the Court.

Three days after the filing of appellant's jurisdictional statement, appellant was invited by a letter from the Clerk of the Court of Appeals (dated July 6, 1978) to exercise an option to submit within 10 days additional comments

justifying the retention of subject matter jurisdiction. The letter offered the same opportunity to the appellee.

The letter was followed by an exchange of submittals by both parties. On July 17, 1978 appellant filed a response to the first letter, on July 20, 1978 the appellee filed an "answer", and on July 28, 1978 appellant filed a "reply" thereto.

The papers filed by both parties in this exchange dealt exclusively with the constitutional issues raised by the appellant; and included opposing contentions regarding not only the applicability of the Barlow case to the instant case, but also regarding all other constitutional issues.

On September 7, 1978 the Clerk of the Court of Appeals addressed a letter to both parties thanking them for their responses, stating that the appeal would continue in its normal course and the Court would not act sua sponte; that the letter did not represent an adjudication of the subject matter jurisdiction, and that the letter was without prejudice to any motion any party may wish to make or to a future consideration of the question by the Court.

The appellee filed a motion to dismiss the appeal (on December 21, 1978), to which the

appellant responded by a letter-memorandum (on January 8, 1979). Only the constitutional issues were argued in the submittals from both parties.

The Court of Appeals dismissed the appeal (on February 6, 1079) on the ground "... that no substantial constitutional question is directly involved."

THE QUESTIONS ARE SUBSTANTIAL

Special note regarding the ruling of the Court of Appeals

Appellant believes that the instant case represents the first case in which the New York State Court of Appeals has ruled on the applicability of the Barlow case to the statute being challenged by appellant as unconstitutional.

Appellant respectfully submits that the applicability of the Barlow case to a State "seizure" statute is of such great importance that it warrants a full briefing, analysis, and argument on this ground alone.

Overview of the substantiality of the questions

That the questions presented are substantial enough to warrant full argument is to some extent

evident from the preceeding outline of the proceedings in the lower state courts wherein both the Court of Appeals and the Appellate Division granted the appellant the stays he requested after full argument on papers.

Appellant is convinced, having deeply researched the law involved, that given the opportunity to bring up the record and to present to this Court a full briefing on the law involved that he can convince the Court that the New York statute is indeed clearly unconstitutional.

The issues here are deep and broad and to the extend that there appears to be an interrelationship between Fourth Amendment and Fifth Amendment questions, appellant submits that in this case the lines can be clearly and discreetly drawn to isolate the Fourth and Fifth Amendment questions so they can stand entirely on their own.

Given appellant's challenges on three broad constitutional fronts (the Fourth, Fifth, and Fourteenth Amendments), appellant respectfully submits that he requires the vehicle of the brief to adequately present to this Court the authoritative support for his basic contentions in all three areas.

Appellant submits unequivocally that with respect to all the cases cited by the Appellate

Division he will be able to demonstrate that all of these cases totally support the position of the appellant and do not support the position of the appellee, with respect to both the Fourth Amendment and Fifth Amendment questions.

And with respect to all of these cases it should also be pointed out that they were all decided before Barlow.

Appellant will rely heavily on Barlow to demonstrate that the challenged New York statute, to be constitutional, must contain a provision that requires the State to obtain an "inspection" warrant in the event it wishes to examine books and records if the party subpoenaed refuses to permit the examination.

Appellant is also prepared to demonstrate, from the cases decided by this Court, that if the State wishes to "examine" the books and records for a civil purpose it must obtain an "inspection" warrant, and when the State wishes to "examine" for a criminal purpose, it must obtain a "search" warrant.

Appellant is also anticipating, and is fully prepared to refute, a thrust by the appellee that there is a "required records" doctrine that sanctions the challenged statute. We submit that this theory is made out of whole cloth and will not stand up to the case law, neither on Fourth

Amendment grounds nor on Fifth Amendment grounds.

Appellant is also prepared to demonstrate fully that the kind of Fifth Amendment problem that arises in a State regarding compulsory authentication and surrender of possession of documents does not arise under Federal agencies because of the following reasons:

(1) There is an "automatic" immunity statute that applies to the proceedings of almost all Federal agencies.

(2) There is generally no penalty for refusal to respond to a subpoena.

(3) The burden is on the government to indicate action to enforce a subpoena in a Federal Court where the subpoenaed party has an opportunity to obtain an evidentiary hearing prior to any judicial sanction.

In a State that does not have this kind of regulatory scheme that exists in the Federal establishment, a party subpoenaed under State law requires the protections of the Fourth, the Fifth, and the Fourteenth Amendments.

This kind of protection is needed in the State of New York. Appellant seeks the opportunity to make this abundantly clear with full argument on the issues presented to this Court.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

DANTE M. SCACCIA

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306 South Salina Street
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(315) 422-4000

Counsel for Appellant

April 7, 1979

APPENDIX

OPINION OF COURT OF APPEALS OF THE STATE OF NEW YORK, dated February 6, 1979.

4 Mo. No. 17

In the Matter of the Application of Thomas M. Fahey, d.b.a. Castle Rest Nursing Home, *Appellant,*

vs.

Charles J. Hynes, Deputy Attorney General of the State of New York (Special Prosecutor), *Respondent.*

For an Order &c.

Motion to dismiss the appeal herein granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

DECISION COURT OF APPEALS FEB 6 1979

OPINION OF THE APPELLATE DIVISION (FOURTH DEPARTMENT) OF THE SUPREME COURT OF THE STATE OF NEW YORK, dated June, 1978.

MEMORANDUM, Fourth Dept., June, 1978 1119

5 In the Matter of THOMAS M. FAHEY, Doing Business as CASTLE REST NURSING HOME, Appellant, v CHARLES J. HYNES, as Deputy Attorney-General of the State of New York, Respondent.—Order unanimously affirmed, without costs. (*Matter of Hynes v Moskowitz*, 44 NY2d 383; see, also, *Shapiro v United States*, 335 US 1, 32-35, reh den 335 US 836; *Matter of Cappetta*, 42 NY2d 1066, 1067; *Matter of Sigety v Hynes sub nom. Kent Nursing Home v Office of Special State Prosecutor*, 38 NY2d 260, 268, cert den 425 US 974.) (Appeal from order of Onondaga Supreme Court—quash subpoena.) Present—Cardamone, J.P., Simons, Hancock, Jr., Denman and Schnepp, JJ.

OPINION OF THE SUPREME COURT, SPECIAL TERM (ONONDAGA COUNTY), OF THE STATE OF NEW YORK, dated February 14, 1978.

FEB 15 1978

State of New York
Supreme Court Chambers
Herkimer, N.Y. 13350

[SEAL]

James P. O'Donnell
Justice

February 14, 1978

Special Prosecutor for Nursing Homes Health and Social Services
109 South Warren Street
Syracuse, New York 13202

Att: Paula M. Ryan, Special Asst. Attorney General

Re: Fahey v. Hynes

Dear Miss Ryan:

This Court clearly feels that this subpoena duces tecum issued under Section 63, subdivision 8 of the Executive Law was clearly within the authority of the Special Prosecutor to issue. The Court, in Matter of Sigety v. Hynes, clearly stated that a nursing home industry, care of elderly and infirm and the compensation for the care of such people from public treasurer are matter of concern for the public peace, public safety and public justice. Matter of Sigety v. Hynes 38 N. Y. 2d 260 It does not appear in this record to show that the Special Prosecutor's Office is using harassing tactics to be so overbroad in its investigation to constitute harassment under

OPINION OF THE SUPREME COURT, SPECIAL TERM (ONONDAGA COUNTY), OF THE STATE OF NEW YORK, dated February 14, 1978.

Page 2.
Special Prosecutor for Nursing Homes, etc.
Re: Fahey v. Hynes

the holding in Myerson v. Lentini Moving and Storage 33 N. Y. 2d 250. The Court in the Friedman v. Hi-Li Manor case held that the power and enforcement of these subpoenas were not a violation of constitutional protection against compulsory self incrimination. Friedman v. Hi-Li Manor 42 N. Y. 2d 408. Bellis v. United States 417 U. S. 85.

Under the circumstances, I am signing this Order dismissing the Petition of Thomas Fahey and directing the Petitioner to comply with this subpoena by delivering the materiais innumerated therein to the Respondents on or before February 23, 1978.

The Petitioner's motion for a Stay be and hereby is denied.

Very truly yours,

JAMES P. O'DONNELL
Justice of the Supreme Court

JRO/gal
Encs.
cc: Love, Balducci and Scaccia
Attorneys-at-Law
300 Wilson Building
306 South Salina Street
Syracuse, New York 13202
Att: Dante Scaccia, Esq.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES, dated April 25, 1979.

IN THE COURT OF APPEALS OF THE
STATE OF NEW YORK

THOMAS M. FAHEY, Appellant,

v. NO. 78-585

CHARLES J. HYNES, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Thomas M. Fahey, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, dismissing the appeal, entered in this action on February 6, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

s/ DANTE M. SCACCIA

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April 25, 1979